

DISTRICT COURT OF THE VIRGIN ISLANDS

DIVISION OF ST. CROIX

PAUL K. SMITH,

Plaintiff,

CIVIL NO. 1995/28

v.

TRANSDUCER TECHNOLOGY, INC.
ENDEVCO CORPORATION and
MEGGITT-USA, INC.

Defendants

TO: Lee J. Rohn, Esq.
George H. Logan, Esq.

ORDER DENYING PLAINTIFF'S MOTION FOR SANCTIONS

THIS MATTER came for consideration on Plaintiff's Motion for Sanctions. Defendant's filed a response in opposition to the motion and Plaintiff filed a response to such opposition.

At issue is the failure of Defendants' expert witness, Carmelo Rivera, to bring to his deposition (on 4/25/00) documents that were requested in Plaintiff's First Amended Notice of Expert Deposition dated April 19, 2000. Plaintiff contends that such documents must be produced pursuant to a **Notice of Deposition** [Fed. R. Civ. P. 30(b)(5)]. Defendant argues that production of documents from non-parties may only be compelled by subpoena *duces tecum* [Fed. R. Civ. P. 45(a)(1)(c)]. Plaintiff retorts that subpoenas may not be issued to an opponent's retained witness pursuant to "Rule 26."

The 1970 Advisory Committee notes to Fed. R. Civ. P.

30(b) (5) state:

A provision is added to enable a party through service of notice, to require another party to produce documents or things at the taking of his deposition. This may now be done as to a non-party deponent through use of a subpoena *duces tecum* as authorized by Rule 45.

As stated in Wright, Miller & Marcus, FEDERAL PRACTICE AND PROCEDURE:
CIVIL 2D § 2108:

The procedure for compelling production of documents at a deposition depends on whether the deponent is or is not a party. If the deponent is not a party, production of the documents can be compelled only by a subpoena *duces tecum* issued under Rule 45. As amended in 1991, Rule 45(a) (1) (C) now authorizes a subpoena to command production of documents at a deposition or without a deposition. If the production is to occur at a deposition, the designation of the materials to be produced pursuant to the subpoena must be attached to or included in the notice of the deposition. If the production is to occur without a deposition, Rule 45(b) (1) requires that prior notice be given to the other parties.

The cases cited by Plaintiff do not establish that Plaintiff may compel documents from an expert witness by notice of deposition absent subpoena, nor that such documents may not be obtained by subpoena *duces tecum*. In *Encarnacion v. Kmart Corp.*¹ D.Ct. STX Civ. 1997/63 (order dated 5/4/00), the issue concerned a **letter**

¹. Henceforth, when citing an unpublished local order, Plaintiff's attorney must identify the case by civil number and the order by date. There have been numerous orders entered in Encarnacion and it was time consuming for the court (and nigh impossible for Defendants) to locate such order.

request for documents sent by opposing counsel to an expert witness who was also a treating doctor.

Fed. R. Civ. P. 34(c) expressly provides that "A person not a party to the action may be compelled to produce documents and things...as provided in Rule 45."

With regard to non-parties, such as Plaintiff's expert witness, a request for documents may be made by subpoena *duces tecum* pursuant to Rule 45.

All West Pet Supply Co. v. Hill's Pet Products Div. 152 F.R.D. 634, 639 (D. Kan. 1993). See also e.g. *Oneida Ltd. v. U.S.*, 43 Fed. Cl. 611, 613 (U.S. Ct. Fed. Claims, 1999). The tension between Rule 45 and Rule 26(b)(4) was analyzed in *Marsh v. Jackson*, 141 F.R.D. 431, 432-33 (W.D. Va. 1992). The court held that a "naked" subpoena *duces tecum* issued without request for deposition may not be served on an expert witness, noting that "[i]n conjunction with that deposition, the expert might be served also with a Rule 45 subpoena *duces tecum* requiring him to produce a designated list of materials or things." That analysis appears cogent and is adopted by this Court.

Plaintiff has not demonstrated any basis for Defendants' expert witness to have produced documents at his deposition pursuant to Plaintiff's Notice of Deposition without an accompanying subpoena *duces tecum* in accordance with Rule

45(a)(1)(c). That Defendants may have previously issued equivalent notices for production does not compel otherwise.²

Accordingly, there is no basis for sanctions. Because the issues merit consideration, there is also no basis for costs to be awarded.

Upon consideration, it is hereby;

ORDERED as follows:

1. Plaintiff's Motion for Sanctions is DENIED.
2. Defendants' request for costs is DENIED.

ENTER:

Dated: May 19, 2000

_____/s/_____
JEFFREY L. RESNICK
U.S. MAGISTRATE JUDGE

ATTEST:
ORINN ARNOLD
Clerk of Court

By:_____/s/_____
Deputy Clerk

². The parties are nonetheless **encouraged** to cooperate in facilitation of discovery and may **by agreement** utilize simplified procedures.